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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1997

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioner,

v.

JOHN M. RYDER,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. Argument

The petition principally presents the legal question whether, in an individual employment discrimination case, allegedly ageist comments made at a temporally remote point by persons not involved in the challenged decision may nonetheless be admitted under the Federal Rules of Evidence for the purported purpose of establishing "corporate culture" or "a cumulative managerial attitude." (Petition Appendix at A-10). As the petition established, there is substantial confusion and conflict among the lower courts concerning this question. (Petition at 9-13). The petition further demonstrated that

this question is one of substantial importance to the fair and efficient administration of the federal judicial docket. (Petition at 13-14). Finally, the petition showed that admitting evidence for the purpose of establishing "attitude" or "culture" is contrary to federal evidence law's longstanding prohibition on the use of "propensity" or "character" evidence. (Petition at 14-16). Respondent's opposition brief offers no substantial contrary argument.

Real Conflict Exists Among Circuits

After a lengthy, self-serving, and wholly irrelevant rendition of the record evidence in the case (Opposition Brief at 2-13), respondent initially suggests that there is no conflict among the lower courts concerning the standards for admitting so-called "stray remarks" into evidence in individual employment discrimination cases. (Opposition Brief at 13-16). But respondent is clearly wrong.

As respondent suggests, some panels in the First and Third Circuits have held that stray remarks may be used for the purpose of establishing corporate "culture" or "attitude." But, as the petition demonstrated (Petition at 9-13), the vast number of courts have held that such evidence is not admissible to show "propensity" or "character" of the organization but only to show the motive or purpose of the decision in issue, and, accordingly, is admissible only when "a nexus exists between the discriminatory comments to be admitted and the allegedly discriminatory action to be proven." *Touchet v. Halliburton Co.*, No. 94-8042, 1996 WL 93974 at **4 (10th Cir. Feb. 29, 1996) (*citing Cone v. Longmont Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994)).

While respondent correctly notes (Opposition Brief at 15-16) that the question of the evidentiary value of stray remarks evidence frequently arises in the summary judgment context, that observation only demonstrates both the breadth and the depth of the judicial conflict. Contrary to respondent's suggestion, many of the cases are pure admissibility cases and the conflict in judicial approach could not be more striking. *See, e.g., Touchet v. Halliburton Co., supra; Boyle v. Mannesmann*

Demag Corp., No. 91-3909, 1993 WL 113734 at **2 (6th Cir. Apr. 13, 1993); *Fortino v. Quasar Co.*, 950 F.2d 389, 395-96 (7th Cir. 1991); *Schrand v. Federal Pac. Elec. Co.*, 851 F.2d 152, 155-56 (6th Cir. 1988); *Haskell v. Kaman Corp.*, 743 F.2d 113, 120 (2d Cir. 1984). Moreover, in the summary judgment context, the courts have determined that stray remarks are "probative evidence only when they directly relate to a particular person, employment decision, or pattern of decision making." *Henson v. Liggett Group Inc.*, 61 F.3d 270, 276 (4th Cir. 1995); *accord, e.g., Nichols v. Loral Vought Sys. Corp.*, 81 F.3d 38, 41-42 (5th Cir. 1996); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511-12 (4th Cir.), *cert. denied*, 513 U.S. 1058 (1994); *EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992); *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 9-10 (1st Cir. 1990); *Gagne v. Northwestern Nat'l Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989). Just as the vast number of courts (but not the Third Circuit) do in pure admissibility cases, these courts are attempting to separate proper uses of stray remarks evidence from improper ones. Thus, the fact that the court in *Wilde v. Florida Pneumatic Mfg. Corp.*, 941 F. Supp. 1203, 1207 (S.D. Fla. 1996) rejected a stray remark as "not probative" in a summary judgment context (Opposition Brief at 16) does not undermine the fact that it recognized three different circuit court evidentiary approaches to the use of such statements by plaintiffs in discrimination cases. *See also* Gorski, S. & Fliegel, R., *Silence is Golden: Guidelines for Evaluating the Admissibility and Legal Sufficiency of 'Age-Related' Statements in Age Discrimination Cases,* 11 Labor Lawyer 189, 190 (1995) (noting with respect to the stray remark doctrine that "courts disagree on the issue of whether age-related statements constitute admissible evidence of age discrimination").

Meaning of Rule - Not Facts - At Issue

Respondent similarly errs in suggesting that "even if [a judicial conflict] does exist, that is how it should be." (Opposition Brief at 16; *see also* 16-18). There is no doubt that trial courts must have discretion in applying rules of evidence law to a myriad of factual situations. Nor is there any doubt that discretionary applications of understood rules of evidence law

are fact-bound and generally not appropriate for this Court's review. However, the question raised here concerns the meaning of the evidence rule itself — whether the Federal Rules of Evidence allow stray remarks evidence to be admitted for the purpose of proving "attitude" or "culture." As the text of Rules 401, 403, 404, and 405 demonstrates, that question is fundamentally one of law, not fact; and, as numerous cases decided by this Court demonstrate, the interpretation of those Rules and the resolution of judicial conflict concerning those Rules is an accepted responsibility of this Court. *See, e.g., Old Chief v. United States,* 117 S. Ct. 644, 647 (1997) (holding that the names and nature of prior criminal offenses are inadmissible to show a prior felony conviction of another offense where the defendant has offered to concede the prior conviction); *Daubert v. Merrel Dow Pharms., Inc.,* 509 U.S. 579, 592-95 (1993) (establishing standards for admissibility of expert opinion under Rules 403, 702, and 703).

Need For Court's Ruling Is Widespread And Immediate

Finally, respondent errs in suggesting (Opposition Brief at 19-25) that intervention by this Court on this question of evidence law would undermine the enforcement of the anti-discrimination laws themselves. While a particular plaintiff or defendant may benefit from an erroneous interpretation of the Federal Rules of Evidence, the employment discrimination laws do not authorize a departure from the evidentiary rules applicable in all other civil cases. Nor do they in any way suggest that continuing judicial confusion about those evidentiary rules is beneficial to the administration of those employment laws. On the contrary, this Court's intervention is needed so that the huge volume of cases arising under these laws, in which the stray remarks issue is a frequently recurring question, are administered under uniform and fair standards.

The stray remarks doctrine has never been the subject of a majority opinion of this Court. *See Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989) (opinion of Brennan, Marshall, Blackmun and Stevens, JJ.); *id.* at 256 (White, J. concurring); *id.* at 261 (O'Connor, J. concurring); *id.* at 279 (Kennedy, J.,

dissenting, joined by Rehnquist, C.J. and Scalia, J.). Moreover, since *Price Waterhouse* was decided, the amended Civil Rights Act of 1991 has produced a radical escalation in the number of jury trials. The resulting exponentially increased potential for unfair prejudiee and jury confusion heightens the importance of clearly specifying the evidentiary standards to be applied to stray remarks by the trial courts in employment cases.

II. Conclusion

For the foregoing reasons and those set forth in the Petition for Writ of Certiorari, Petitioner respectfully asserts that its Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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